

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DESHAWN JOHNSON,

Petitioner,

v.

CASE NO. 2:07-CV-490
JUDGE FROST
MAGISTRATE JUDGE KING

MICHAEL SHEETS, Warden,

Respondent.

OPINION AND ORDER

On April 3, 2008, the Magistrate Judge issued an *Order* granting in part and denying in part petitioner's motion to amend the petition to assert additional claims. *Order*, Doc. No. 33. On July 29, 2008, the Magistrate Judge issued a *Report and Recommendation* recommending that the three claims properly asserted in this action for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be dismissed. *Report and Recommendation*, Doc. No. 41. Petitioner has filed objections to the Magistrate Judge's *Order* and *Report and Recommendation*. *Objections*, Doc. No. 45. For the reasons that follow, petitioner's objections are **OVERRULED**; the *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Petitioner objects to the Magistrate Judge's order denying leave to amend his petition with additional time-barred claims. Petitioner again argues that the claims with which he seeks to amend the petition may properly be considered by this Court because they arose from the same transaction or occurrence and are therefore properly considered

under *Mayle v. Felix*, 545 U.S. 644 (2005). Further, according to petitioner, the Magistrate Judge should have permitted him to amend the petition to include additional time-barred claims because he made his request to amend the petition prior to the filing of respondent's initial response to the petition. Because the *Order* of the Magistrate Judge is neither clearly erroneous nor contrary to law, *see* 28 U.S.C. §636(b), the Court rejects petitioner's request to reconsider the Magistrate Judge's denial of leave to amend the petition.

Petitioner also objects to the Magistrate Judge's recommendation that claim one be dismissed as without merit and that claim two be dismissed as procedurally defaulted. Petitioner raises all of the same arguments in support of these claims as were presented to the Magistrate Judge.

Pursuant to 28 U.S.C. §626(b), this Court has conducted a *de novo* review of the *Report and Recommendation*. The Court is not persuaded that claim one warrants federal habeas corpus relief, or that petitioner has established cause and prejudice for his procedural default of claim two. Petitioner has failed to preserve his claim of ineffective assistance of appellate counsel, because, as determined by the State appellate court, petitioner's Rule 26(B) petition was untimely.¹ Moreover, that claim, presented in claim three of the petition, therefore cannot constitute cause for his procedural default of claim two. The *Report and Recommendation* is therefore **ADOPTED** and **AFFIRMED**. This

¹Petitioner also explains that he did not frame his claim of ineffective assistance of appellate counsel in Rule 26(B) proceedings as an issue of constitutional magnitude only because of page limitations imposed by the Ohio appellate court. *Objections*, at 16. The Court is not persuaded by this explanation.

action is hereby **DISMISSED**.

The Clerk shall enter **FINAL JUDGMENT** in this case.

/s/ Gregory L. Frost
Gregory L. Frost
United States District Judge